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IN THE

Supreme Court of the United States

October Term, 1967.

No. 78.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291, ITS OFFICERS AND MEMBERS,
Petitioners,

v.

PHILADELPHIA MARINE TRADE ASSOCIATION.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit.

BRIEF FOR PETITIONER.

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OPINIONS OF THE COURTS BELOW.

The District Court below did not render any opinion, but filed an order which is printed in the Record at pp. 150-51. The opinion of the Court of Appeals for the Third Circuit, reported at 368 F. 2d 932, is printed in the Record at p. 157. The order of the Court of Appeals for the Third Circuit denying rehearing is printed in the Record at p. 161.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on November 17, 1966 (R. 160). The order denying rehearing was entered on January 6, 1967 (R. 161). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

In a case arising out of a labor dispute, the Trial Judge entered an order enforcing the arbitrator's award without explaining it, and he refused to state whether it restrained a work stoppage; thereafter, a "wildcat" strike occurred because of a new dispute, which the union, in good faith, could not avert or stop; the union demanded arbitration, which the employers contended violated the court's order, and they made an ex parte oral "report" to the Trial Judge who conducted an immediate hearing without requiring a complaint specifying the alleged contempt and held the union in contempt for the "mass action" of its members; did not the Trial Judge commit fundamental error in:

(a) conducting a hearing and holding the union in contempt, notwithstanding that the court had no jurisdiction to entertain the proceedings under Section 4 of the Norris-LaGuardia Act; (this question is fully covered in petitioner's argument in Case No. 34)

(b) holding a contempt hearing upon an ex parte "report" without requiring the filing of a written complaint;

(c) denying the union the right to a jury trial under the Act of 1948;

(d) holding the union in contempt because of the "mass action" of certain of its members who engaged in a "wildcat" strike?

STATUTES AND RULES INVOLVED.

The statutory provisions and rules involved are: Norris-LaGuardia Act, Act of March 23, 1932, c. 90, Sec. 4, 47 Stat. 70, 29 U. S. C. A. 104; Act of June 25, 1948, c. 645, 62 Stat. 844, 18 U.S.C.A. 3692; Federal Rules of Civil Procedure 3, 4, 8, 38(a), 52(d) and 65(d). They are set out in Appendix hereto.

STATEMENT OF THE CASE.[1]

Philadelphia Marine Trade Association (PMTA) represents the employer group under the terms of a collective bargaining agreement with Local 1291, International Longshoremen's Association (ILA) in the Port of Philadelphia.

The agreement provides for the employment of longshoremen on the day before the commencement of the work. Article 10(6) provides that the employer may, at 7:30 a.m., "set back" the starting time from 8:00 a.m. to 1:00 p.m., in which event the longshoremen receive a one-hour guarantee for the morning (No. 34, R. 7). Article 9(h) provides that if the employment is terminated because of inclement weather, the men shall receive a four-hour guarantee (No. 34, R. 12). Section 28 of the agreement provides for grievance and arbitration procedure and requires that all disputes and grievances "of any kind or nature whatsoever arising under the terms and conditions of this agreement" shall be submitted to a grievance committee; and if the dispute is not settled at that level, then it must be submitted to arbitration (No. 34, R. 12-13).

On April 25, 1965, T. Hogan Corporation, one of the employer members of PMTA, hired a number of longshoreman gangs for an 8:00 a.m. start the next day. The following morning Hogan changed the starting time to 2:00 p.m. because of inclement weather and offered only one hour of the guarantee time for the loss of the morning's employment under Article 10(6) of the union agreement. The union objected, claiming that the men were entitled to four hours' pay under the inclement weather clause, 9(h). The matter was submitted to arbitration and, after a number of hearings, with extensive testimony rendered by both sides,

1. Since this case and No. 34 of this Term are companion proceedings, the latter being the injunction action from which flowed this contempt proceeding, this statement is the same as in Brief for Petitioner in No. 34, including a complete resume of the facts in both cases.

the arbitrator declined to hear summation from counsel for both sides and stated further that he did not desire any briefs from the parties. Several weeks later, he rendered a decision holding that Section 10(6) of the agreement, standing by itself, required a one-hour guarantee, and he, accordingly, rejected the union's claim for four hours. He refused to consider the inclement weather clause or any other section of the agreement than 10(6) on which he based his conclusion (No. 34, R. 16-31).[2]

The award of the arbitrator provided that the employer could invoke the set back clause 10(6) "without qualification" under a one-hour guarantee (No. 34, R. 31).[3]

On July 29, 1965, another dispute erupted when Nacirema Operating Co., another employer, not involved in the prior dispute, changed the starting time from 8:00 a.m. to 1:00 p.m. because of inclement weather and offered the longshoremen one-hour guarantee time, instead of the four-hour guarantee under the inclement weather clause. The union demanded arbitration of the dispute under the agreement, but the employer frustrated the arbitration procedure by bringing an action in the federal court to extend the arbitrator's decision in connection with the dispute of April 26, 1965 to all future disputes, and sought to restrain any further union attempts to arbitrate that issue or the inclement weather clause issue and to enjoin all work stoppages in connection therewith.[4] The

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2. It is extraordinary that the arbitrator should decline to hear the arguments of counsel at the end of the evidence or to request briefs so that both sides would have an opportunity to fully express their views regarding the inferences and conclusions to be drawn from the evidence and the interpretation to be given to the agreement as a whole, not merely any single section thereof.

3. There is no provision in the award requiring the longshoremen to return to work because there was, in fact, no work stoppage.

4. The agreement required that "all disputes" must be submitted to grievance and arbitration. Moreover, Section 28, the arbitration clause, provides that "should the terms and conditions of this agreement fail to specifically provide for an issue in dispute or should a provision of this agreement be the subject of disputed interpretation, the arbitrator shall consider *port practice* in resolving the issue be-

suit was treated as one for an injunction; and the District Judge scheduled an immediate hearing, by which time the longshoremen had all returned to work, and the action had become moot. Judge Body denied the union's motion to dismiss on the ground of mootness and for lack of jurisdiction, and he "retained jurisdiction" of the case so that "if anything arises", he would "handle it at that time" (No. 34, R. 45, 46, 61, 73, 82).[5]

A new dispute arose involving an entirely different group of employers on September 13, 1965, when a large group of gangs who had been employed the day before were advised that they would be set back from an 8:00 a.m. start to a 1:00 p.m. start that day because of inclement weather, and they were offered the one-hour guarantee, instead of the four-hour guarantee under the inclement weather clause (R. 70). The union claimed the four-hour guarantee under the inclement weather clause, and the employers refused. The union demanded arbitration, which the employers denied (No. 34, R. 80-81). Instead, counsel for the employers "reported" ex parte to the District Judge, who then scheduled an immediate hearing on the basis of the "facts" reported (No. 34, R. 75). At the hearing on September 13 and 15, 1965, the union objected and moved that the "facts" be pleaded, as required by the Federal Rules of Civil Procedure (No. 34, R. 79-81, 88). This motion was summarily denied (No. 34, R. 90). The union repeated the motion to dismiss for lack of jurisdic-

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fore him" (No. 34, R. 14). Furthermore, the record shows that on prior occasions, a disputed clause in the agreement was arbitrated on each occasion that a dispute arose, even though the issue was identical; and, with respect to one of the provisions in the same agreement, the identical issue was re-arbitrated as many as five times, and, on the last occasion, the arbitrator reversed his prior rulings (R. 118-119).

5. In support of the motion to dismiss, counsel for the union cited this Court's decision in *Sinclair Refining Co. v. Atkinson,* 370 U. S. 195, but the court summarily denied the motion without examining the decision (No. 34, R. 82). The court also ignored this Court's decision in *Amalgamated Assn., etc. v. Wisc. ERB,* 340 U. S. 416, 95 L. Ed. 389, which held that mootness deprived a federal court of jurisdiction and required a dismissal of the complaint.

tion based on this Court's decision in *Sinclair Refining Co. v. Atkinson,* 370 U. S. 195 (No. 34, R. 82-83), but this motion also was summarily denied (No. 34, R. 83). The hearing proceeded on the "facts" reported to the judge. Counsel for the union refused to cross-examine any witnesses or to offer any evidence on the ground that he could not properly present any defense because of the absence of the necessary pleadings and other requirements of the Rules (No. 34, R. 95, 97, 101).

At the conclusion of the hearing, the court entered an order stating that the arbitrator's award "be specifically enforced", and that the union "comply" with said award (No. 34, R. 113).[6] Since the arbitrator's award simply construed Section 10(6) of the agreement and refused the union's claim for four hours of guarantee time, it was completely unclear what was intended by the court's order. Union counsel, therefore, requested clarification and, particularly, to determine whether the court's order restrained a strike or a work stoppage or precluded the union from attempting to invoke the arbitration process in future disputes (No. 34, R. 111-112). Judge Body flatly refused to explain or amplify his order and to make findings as required by the Federal Rules of Civil Procedure (No. 34, R. 112-113).[7]

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6. The arbitration award (No. 34, R. 30) simply denied the claim of the union for four hours and sustained the employer's position that only one hour was due under the set back clause. The award did not contain any order or instruction that the longshoremen return to work. Indeed, there was no work stoppage in connection with the dispute of April 26, 1965.

7. The record shows a determined effort by counsel for clarification, and an even greater determination by the District Judge to keep defendant in the dark (No. 34, R. 111-112):

"THE COURT: I will sign this order.

"MR. FREEDMAN: Well, what does it mean, Your Honor?

"THE COURT: That you will have to determine, what it means.

"MR. FREEDMAN: Well, I am asking. I have to give my client advice and I don't know what it means. I am asking Your Honor to tell me what it means. It doesn't——

Five months after the entry of the foregoing order, on February 24, 1966, a different group of companies employed a large number of longshoreman gangs to start work at 8:00 a.m. the following morning. The next day the employers, at *7:50* a.m., set back the starting time to 1:00 p.m. because of inclement weather and offered to pay only the one-hour guarantee instead of the four-hour guarantee under the inclement weather clause.[8] The longshoremen protested to the union officials, who advised them to report as directed, and they would invoke the grievance and arbitration machinery in an effort to obtain the four-

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"THE COURT: You handled the case. You know about it. You are arguing it doesn't fit into this case.

"MR. FREEDMAN: I am telling you very frankly now I don't know what this order means, this proposed order. It says, 'Enforcement of the award.' Now, just what does it mean? Are we being restrained from a work stoppage? . . .

"THE COURT: The Court has acted. This is the order.

"MR. FREEDMAN: Well, won't Your Honor tell me what it means?

"THE COURT: You read the English language and I do.

"MR. FREEDMAN: I will ask you, but it doesn't say it. I can't understand it. I am telling Your Honor I don't understand it. Now, perhaps Your Honor can explain it to me. Does this mean that the union cannot engage in a strike or refuse to work or picket?

"THE COURT: You know what the arbitration was about. You know the result of the arbitration.

"MR. FREEDMAN: The arbitration here was under a specific set of facts, involved an interpretation of the contract under a specific set of facts, and he made that interpretation. Now, how do you enforce it? That case is over and done with. These are new cases. Your Honor is changing the contract of the parties when you foreclose them from going to arbitration on this point again.

"THE COURT: I have signed the order. Anything else to come before us?

"MR. FREEDMAN: I know, but Your Honor is leaving me in the sky. I don't know what to say to my client."

8. The set back clause 10(6) under which the employers allegedly set back the starting time required that the longshoremen be notified at *7:30* a.m.

hour guarantee (R. 70, 86-87, 127).[9] However, provoked by the frequency of the set backs over the past ten months, the longshoremen who had been denied employment that morning marched up and down the waterfront and succeeded in causing other longshoremen to knock off work on other vessels, despite the pleas of the union officials to continue working while they made an effort to adjust the matter with the employers. The union distributed circulars along the waterfront and made personal pleas thereafter urging the men to return to work.[10] The employers admitted that the union and the officials did all in their power to effect the return of the men to their jobs (R. 5, 148). Even the president of the employer association admitted the sincerity of the union officials' efforts (R. 53).

The union officials orally asked the employer association to discuss the matter under Section 28, the grievance and arbitration provision in the agreement, but the employers refused. The union then sent a telegram to the employers invoking the grievance and arbitration clause under the contract (R. 29-30, 92-93). Thereupon the employers "reported" ex parte to Judge Body the "facts" relating to this latest work stoppage and claimed that the union had violated the Court's order because it sought arbitration of the issue.

No pleading or other document was filed setting forth the employer's position or its contentions, but the court nevertheless scheduled a contempt hearing a few days later, on March 1, 1966. At the outset of this hearing, the

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9. During the period of ten months from the time of the first dispute on April 26, 1965 to the time of the last-mentioned dispute, the employers had set back the longshoremen seventy-one times and paid only the one-hour guarantee, instead of the four-hour guarantee claimed by the longshoremen (R. 31). This became a constant source of discontent among the longshoremen and undoubtedly was the cause of growing unrest.

10. (R. 70-71, 80, 82-83, 87-88, 91-92, 94-95, 104-106, 109-110, 111, 127-131, 134-136, 139-142, 144-147; Ex. R-1 (R. 39-41), Ex. R-2 (R. 151-152).)

union moved that the employers be required to file a pleading setting forth the facts and circumstances and manner in which the union was supposed to have violated the court's order, so that the union could file an answer and prepare its defense (R. 15-16).[11] The court summarily denied this motion (R. 17). The union then moved for a dismissal on the ground that the entire proceeding was in violation of Section 4 of the Norris-LaGuardia Act and of this Court's decision in the *Sinclair* case; but the District Judge promptly denied this motion also, and directed the parties to proceed with the testimony (R. 15). The union then filed a written application for a jury trial under the Act of 1948, but Judge Body summarily denied this motion also (R. 13, 15). At the conclusion of the testimony, the District Judge rendered an oral decision from the bench holding the union *and its officers and members* (although neither the officers nor members were made parties at any time to the action) guilty of contempt, on the ground that the union was responsible for the "mass action" of its members, and fined the union $100,000.00 per day, making it retroactive to 2:00 p.m. that day and for the succeeding days of the "wildcat" work stoppage (R. 150-151).

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11. In addition to the other defenses heretofore outlined, the union also could have alleged in an answer (if appropriate pleadings had been filed with an opportunity to answer by the union and crystallize the issues) the further defense that the employers had failed to set back the men at 7:30 a.m., as required by 10(6) of the very clause on which the employers relied. The District Judge, however, rejected all arguments that each dispute must be individually handled and ignored this argument also (R. 18).

ARGUMENT.

I. If the Basic Injunction Action Involved in Case No. 34 Is Dismissed for Lack of Jurisdiction, the Order of Contempt and the Fine Must Necessarily Fall.

Petitioner's contention that the Court below was without jurisdiction is argued extensively in the brief in Case No. 34, and will not be repeated here. If this Court should reverse the order in Case No. 34, which was construed to be a restraint against a work stoppage, the order holding the union in contempt would likewise have to be reversed, under the doctrine announced by this Court in *United States v. United Mine Workers*, 330 U. S. 258, 91 L. Ed. 884. In that case, this Court stated on this precise point:

> "The right to remedial relief falls with an injunction which events prove was erroneously issued, Worden v. Searls, supra (121 U. S. at 25, 26, 30 L. ed. 857, 858, 7 S. Ct. 814); Salvage Process Corp. v. Acme Tank Cleaning Process Corp., (CCA 2d) 86 F. 2nd 727 (1936); S. Anargyros, Inc. v. Anargyros & Co., (CC) 191 F. 208 (1911); and a fortiorari when the injunction or restraining order was beyond the jurisdiction of the court. Nor does the reason underlying United States v. Shipp, 203 U. S. 563, 51 L. ed. 319, 27 S. Ct. 165, 8 Ann. Cas. 265, supra, compel a different result. If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety." (U. S. at 295, L. Ed. at 913) [12]

12. In the Court below, respondent contended that the contempt order falls with the injunction *only* where a *compensatory* fine is ordered paid to plaintiff; and *not* where the order was to coerce defendant into compliance. This is clearly not the law. This Court has divided contempt orders into only two categories: civil, to remedy and criminal, to punish. The remedy can be to compensate the plaintiff *or* to coerce the defendant. Thus, in *Harris v. Texas and Pacific R. R.*, 196 F. 2d 88, 89-90 (7 Cir. 1952) where in civil con-

It follows that the present contempt proceeding would be abated by a termination of the injunction proceeding out of which it arose.

II. Proceeding With a Contempt Hearing Upon the Oral "Report" of a Party Without Requiring Complaint, Violated F. R. C. P. 3; Failure to Serve Such a Written Complaint Upon Defendant Violated F. R. C. P. 4; Failure to Advise Defendant by Written Complaint of What He Was Required to Defend Against Violated F. R. C. P. 8; and the Failure to Clarify and Make Findings With Respect to the Injunctive Order Alleged to Be Breached Violated F. R. C. P. 52(a) and 65(d).

The procedures followed by the employers in the District Court below in this contempt proceeding have flagrantly flouted every concept of due process of law and required legal procedure. The only papers on file herein are the Rule to Show Cause, Petitioner's Demand for a Jury Trial, and the transcript of the testimony. There is no complaint or other pleading, as required to commence the action (F. R. C. P. 3), to notify the defendant thereof (F. R. C. P. 4), or to advise defendant of what he has to defend against (F. R. C. P. 8).

With respect to the injunction order alleged to have been breached, the failure to make findings of fact and conclusions of law has already been noted and considered in our brief, in Case No. 34, which is also before this Court.

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tempt, the defendant had been imprisoned, and no fine or compensation had been ordered, the Court said that, in accordance with the *United Mine Workers* case (quoting the First Circuit in *Parker v. U. S.*, 153 F. 2d 66, 71) (90): "Since the complainant in the main cause is the real party in interest with respect to a compensatory fine *or other remedial order* in a *civil* contempt proceeding, if for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated.' . . ." (90) (Emphasis supplied.) The same situation exists in the instant contempt case, where the fine was also not compensatory, but coercive, and was, thus remedial.

What was stated there applies with equal force here, because no contempt order should be entered unless the order alleged to be violated is sufficiently clear as to leave no doubt in the mind of the alleged violator of the activities being enjoined.

The District Judge, having ignored Rules 52(a) and 65(d) requiring findings, and refusing to clarify the injunctive order so that defendants were completely in the dark, continued with this basically erroneous procedure by ignoring every one of the remaining basic rules, and requiring petitioners to enter into a case without knowledge of the claim or charge, without affording petitioners any opportunity whatsoever for preparation; and in otherwise violating the due process requirements. Moore's Federal Practice, Volume 2, p. 1783. In *Philippe v. Window Glass Cutters League*, 99 F. Supp. 369, involving a civil contempt, the court held that there should be a pleading directed to the Court which sets forth the acts or conduct allegedly constituting the contempt, that there should be reasonable notice to the one charged with the contempt and a specification of the acts or conduct allegedly constituting the contempt. Said the court:

> "In other words, the basic requirements of due process, notice and hearing, should be followed. The original pleading or 'accusation' should conform to the standards set by Rule 8, Federal Rules of Civil Procedure, 28 U. S. C. A., for the statement of a claim, wherein it is provided that a pleading 'shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.'"

The actions of the District Judge totally ignored all of these requirements of due process, thereby setting up a trap which defendants could not escape. *Yet, the Court of Appeals incredibly failed to consider or discuss this glaring failure of process and procedure.* Thus, the Court below sustained a contempt order in the face of a record which established conclusively that the petitioners could not determine what acts they were allegedly prohibited from performing. This failure to follow the Rules of Civil Procedure most seriously violated petitioners' rights, indeed to the point where the union will be completely put out of business and destroyed by the order of the Court below.

More important, this departure from and indifference to the rules of procedure would undermine the due process requirements generally, and would tend to establish a rule based on the discretion and whim of individual judges without the protection of the due process requirements and the established rules of law.

III. The District Judge Erred in Holding the Union Liable for "Mass Action" of Certain of Its Members Who Engaged in a "Wildcat Strike" Where the Record Indisputably Establishes That the Union Did Everything Possible in Good Faith to Avert and Terminate the Strike.

Although the District Judge held the petitioners in contempt only because the wildcat strike was a "mass action" which the union's repeated efforts could not prevent and terminate, and petitioners strongly contested this legal conclusion, urging that the Court of Appeals follow the decision of the Court of Appeals for the District of Columbia in *United States v. United Mine Workers,* 177 F. 2d 29, the Court of Appeals neither discussed, considered, nor passed upon this point. A Petition for Rehearing, pointing this out to the Court, was likewise unsuccessful in

obtaining judicial consideration of this most significant issue.

At the trial, the respondent admitted that the union did not cause the wildcat strike, but did everything possible to avoid it and terminate it after it started. The District Judge made the specific finding that the individual members themselves stopped work in a "wildcat" action and that the union leaders urged them to return to work (226a-227a). He made it clear that the contempt order was *not* predicated upon the improper actions or inaction of the union officers, but upon the lack of success in their efforts—that "they did not return to work" (227a). The union and its officers were held in contempt because the Court concluded that the union is automatically responsible for the "mass action of its members", despite the union's efforts against it.

The District Judge's "mass action" conclusion was a misapplication of a principle stated by the District of Columbia Court in *United Mine Workers v. United States,* 177 F. 2d 29 (1949). In that case, the District Court had held a union in contempt as responsible for "the mass action of its members".[13] There was no evidence of any effort by union officials to prevent or terminate the strike. On appeal, the Court of Appeals affirmed, but made it very clear that such affirmance was because the union had sent *no* word to its striking members to return to work within the period involved (35). The Court said (at 36):

> "It seems plain enough that if Lewis had sent on April 5th telegrams of a directory or advisory nature . . . . neither he nor the Union would have been guilty of contempt of the court's order. . . ."
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> ". . . we repeat that the Union was not convicted for causing the walk-out. It was convicted because it did not exercise, or attempt to exercise, whatever

13. 77 F. Supp. 563, 567 (D. C. 1948).

powers it had to cause its members to resume work. . . . Quite apart from what the miners did, the Union made no attempt to direct, instruct, or persuade them to return to work, and thereby it disobeyed the court's order."

Thus, the Court made certain that the "mass action" rule emanating from that District was impressed with a specific exceptive proviso where the union attempts to have the men return to work. Subsequently, when the same parties were again before the District Court in a contempt proceeding,[14] the same Court that announced the "mass action" rule pointed out that in view of the Court of Appeals' statement, where the record fails to demonstrate "either beyond a reasonable doubt or by clear and convincing evidence—that there has been willful contempt of this Court's order on the part of the Union", contempt does not lie (191); that

> "The record in this case is different from that in the 1948 contempt proceeding against the same respondent. *There* it was shown that the Union had 'made no attempt to restore normal production.' . . .
>
> "Following the court's order in the *instant* case, various telegrams, letters, and other communications were sent by the Union to its district and local branches and members, instructing the miners to return forthwith to work.
>
> "This court does not hold that any telegram or combination of telegrams or letters would constitute a good faith compliance with an order directing action on the part of the Union. It does hold that, where the Union has sent communications such as are included in this record, the apparent good faith of such communications must be controverted *not by mere suspicion based on failure to obtain results,* but by *clear*

14. *United States v. United Mine Workers,* 89 F. Supp. 179 (D. C. 1950).

> *and convincing evidence,* if they are to be ruled by a court of law to constitute only a token compliance." (89 F. Supp. at 181) (Emphasis supplied.)

As to the weight to be accorded to the evidence, the court made this significant holding:

> "It may be that the mass strike of Union members has been ordered, encouraged, recommended, instructed, induced, or in some wise permitted by means not appearing in the record; but this court may not convict on conjecture, being bound to act only on the evidence before it, which is insufficient to support a finding of either criminal or civil contempt.
>
> "I therefore, find the respondent Union not guilty of civil or criminal contempt." (89 F. Supp. at 181)

It is obvious that the District Judge grossly misunderstood the "mass action" decision. The decision below has applied a legal principle without giving effect to its essential proviso, thereby erroneously convicting petitioners of contempt. *The Court of Appeals failed to take cognizance of the rule, altogether.* The issue is a most important one and of an overwhelmingly recurrent nature, so long as free men will be permitted to give personal expression to their complaints and desires. If the broad swath cut by the affirmance below is permitted to stand, free individual expression will bear a penalty that organized labor will never survive.

The decision of the Court of Appeals for the District of Columbia stands unopposed. The Court of Appeals below passed over and failed to give any consideration whatever to this vital issue, both on the original argument and on the petition for rehearing. Courts may not abandon rules of law, no matter how strongly they may disapprove of strikes or of wildcat work stoppages.

IV. The Lower Court's Refusal to Grant a Jury Trial Violated the Act of 1948 and Was a Deprivation of Due Process and in Conflict With the Strict Policy Declared by This Court in Beacon Theatres v. Westover, 359 U. S. 500.

This Court has made it crystal clear and beyond doubt that the right to trial by jury is basic in our jurisprudence and that *any deprivation thereof must* be most closely scrutinized. Thus, in *Beacon Theatres v. Hon. Harry C. Westover, District Judge,* 359 U. S. 500, 3 L. Ed. 2d 988 (1959), a mandamus proceeding upon refusal to grant jury trial, Mr. Justice Black most emphatically declared:

> " 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' " (U. S. at 501, L. Ed. at 992)

> ". . . In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it. . . ." (U. S. at 510, L. Ed. at 997)

The basic right to a jury trial is stated in the Constitution, Amendment Seven. Federal Rule of Civil Procedure 38(a) provides:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

More specifically, Congress has enacted a special legislation to be applicable in *all contempt actions* growing out of *labor disputes.* The Act of Congress of June 25, 1948, c. 645, 62 Stat. 844, 18 U. S. C. A. 3692, provides:

"§ 3692. *Jury trial for contempt in labor dispute cases*

"In *all* cases of contempt arising under the law of the United States governing the issuance of injunctions or restraining orders in *any* case involving or *growing out of a labor dispute,* the accused shall enjoy the right to a speedy and public trial by an *impartial jury* of the State and district wherein the contempt shall have been committed." (Emphasis supplied.)

This clear and unequivocal language repels any distinctions which would cut the heart out of the letter and spirit of the Act. It covers *all* cases of contempt without regard to the nature of the contempt, so long as a *labor dispute* is involved.

At the outset of the contempt proceeding before the District Court on March 1, 1966, petitioners' counsel filed a written demand for jury trial, citing said statute. This was denied by the Court. The Court of Appeals held that the jury trial statute of 1948 is inapplicable because it applies only to injunctions in labor disputes, and that "*the order under review is not an injunction* . . . but an order . . . for specific performance of the bargaining agreement which made the award final and binding. . . . Nor does it involve or grow out of a labor dispute". The Court rationalized that although there *was* a labor dispute between employer and union, nevertheless "it had been settled by the arbitrator's award . . . and was no longer alive"; that the order arose from the union's failure to comply with the Court's order. This is indeed an amazing conclusion in view of the record which establishes, beyond the shadow of a doubt, that the controversy was still raging and had resulted in a wildcat strike by members of the union, a strike which originated in a specific labor dispute *which did not even have its factual beginnings until long after the arbitration award.* It is hardly less than incredible that the Court could reach such a conclusion in

the face of the evidence in this case. Moreover, in every case of contempt "in any case involving or *growing out of a labor dispute*", the labor dispute necessarily becomes one step removed by the intervention of a basic order of injunction, or, as the Court terms it, of specific performance. In either situation, the case still involves or *grows out of* "a labor dispute". It is this same reasoning concerning the same injunctive order that is to be reviewed by this Court in the parent case, No. 34. This play on semantics and the reasoning of the Court below was forthrightly rejected by the New York District Court in *Marine Transport Lines v. Curran,* 55 L. C. 11748 (2/27/67), as follows:

> "This is a labor dispute. Petitioner does not claim otherwise. The court is being asked to enjoin a work stoppage. This is the reality of the situation, whatever may be the form of the proceeding. To the extent that *Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n.* (54 L. C. para. 11,393) 365 F. 2d 295 (3rd Cir. 1966), cert. granted, 35 U. S. L. Week 3277 (1967), is to the contrary, I decline to follow that decision."

The Court of Appeals has also attempted to circumvent the clear language of the Act by applying "natural inference" to deprive petitioners of jury trial. It holds that the 1948 statute took the subject matter of Section 3692 out of the Norris-LaGuardia Act and made it a part of the criminal code and that the "natural inference" is that this section is applicable only in criminal proceedings, and that the instant proceeding is civil. This "inference" ignores the clear, mandatory language of the Section, which specifically directs a jury trial in "*all* cases of contempt . . . in any case involving or growing out of a *labor dispute* . . ." (Emphasis supplied.) We must assume that "the legislative purpose is expressed by the ordinary meaning of the words used" *Richards v. U. S.,* 369 U. S. 1, 9, 7 L. Ed. 2d 492, 498 (1962). The intent that the section shall apply to

all cases of contempt in labor dispute injunctions could not be more clearly or succinctly expressed.[15]

The language of the statute is not only unambiguous but the legislative history when it was first incorporated into the Norris-LaGuardia Act[16] confirms the *broad* guarantee of the Act. The House bill had applied only to criminal contempts; the Senate bill covered all cases of contempt. At conference, it was agreed that the word "criminal" be eliminated (75 Cong. Rec. 6450—remarks by Senator Norris). Senator Norris thus explained the Conference Bill to the Senate:

> "The Senate also, in that compromise, succeeded in striking the word 'criminal' out of the House section. Under the House bill, before a man would be entitled to a jury trial on a charge of contempt, it would first have to appear that it was a criminal contempt. Under the Senate bill it could be either civil or criminal. Under the compromise made, the language of the Senate was agreed to, so that now anyone charged with *any kind of a contempt* arising under any of the provisions of this act will be entitled to a jury trial in the contempt proceedings." 75 Cong. Rec. 6453, (March 18, 1932) (Emphasis supplied.)

Similarly, before the House of Representatives, Congressman Dyer said, of the Conference Bill:

> ". . . The House provision provided for criminal contempts, that there should be a jury trial in such cases. We struck out the word 'criminal', and *a jury*

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15. To use the language of Chief Justice Warren in the *Richards* case (U. S. at 9, L. Ed. at 498): "We believe that it would be difficult to conceive of any more precise language Congress could have used to command application" of this section to *all* labor dispute contempt cases, civil or criminal "than the words it did employ" in this Section.

16. Act of March 23, 1932, c. 90, Sec. 11, 47 Stat. 72, 29 U. S. C. A. 111, upon which the Act of 1948 was based. See Reviser's Note, 19 U. S. C. A. 3692.

trial is now in order for contempt, civil or criminal." 75 Cong. Rec. 6337 (March 16, 1932) (Emphasis supplied.)

Thus, the original statute, as it appeared in Section 11 of the Norris-LaGuardia Act was applicable to all cases of contempt, whether civil or criminal, arising under that Act. The 1948 amendment *broadened* the jury guarantee by providing for jury in "*all* cases of contempt . . . in *any* case involving or growing out of a labor dispute." The 1948 Act not only preserved the jury to *all* cases of contempt, but broadened it to cover any labor dispute *whether arising under Norris-LaGuardia or not.*

In face of such a clear mandate, only if a specific exception to this provision is statutorily declared, can a labor contempt case be insulated from this protection. Constitution of U. S., Amendment Seven; F. R. C. P. 38(a).

The inclusion of Section 3692 in Title 18, U. S. C., does *not* limit its effect to cases of *criminal* contempt only. This section is a re-enactment of Section 11 of the Norris-LaGuardia Act, 29 U. S. C. A. 111. The only change is that while the original provision was limited to all cases arising "under this Act" (Norris-LaGuardia), the re-enactment is applied to all cases "of contempt arising under the laws of the United States governing . . . injunctions . . . in any case involving or growing out of a labor dispute. Therefore, Congress must be held to have intended that the language of the new section should derive its meaning from definitions supplied or reached under the Norris-LaGuardia Act, which was *not* limited to criminal contempt, but applied as well to civil. This Court has already made it clear that the general purpose of the 1948 revision of the Criminal Code was to codify and revise, *while preserving the original intent. U. S. v. Cook,* 384 U. S. 257, 16 L. Ed. 2d 516 (1966). A change in intent or application can be assumed only if there is a specific change of substantive language or some other "specific indication that Congress had receded from the intention it clearly expressed". Above all, the words must be given "their fair meaning in accord with the evi-

dent intent of Congress . . . as evidenced by common usage . . . " *Id.*[17]

The legislative history and the clear language of the Act compel the conclusion that it applies to *all* cases of contempt and makes a jury trial mandatory if requested, regardless of whether the contempt be criminal or civil—so long as it grows out of a labor dispute.

Petitioners made timely demand for a jury trial under the Act of 1948 in writing and orally, but were denied this vital right. For this reason alone the contempt hearing conducted by the Court below should be deemed a nullity and contempt order and fine declared a nullity.

CONCLUSION.

The Trial Judge ignored and violated virtually every procedural and substantive rule and every concept of due process from the taking of jurisdiction in this case to the conclusion in holding the union in contempt.

In sustaining the Trial Judge, the Court of Appeals completely ignored and refused to give consideration to the vital points involved, such as the violations of the Rules in failing to require a complaint and the other mandatory procedural safeguards, and in failing to touch on or give any consideration to the substantive features as the "mass action" holding. These points were vigorously pressed below and again highlighted in a petition for rehearing—but all to no avail.

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17. The same principle has been applied to the 1948 revision of the Judicial Code, 28 U. S. C. A. In *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U. S. 222, 228, 1 L. Ed. 2d 786, 790 (1957), this Court said: "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." The "natural inference" drawn by the Court below, in the instant case, clearly conflicts with this rule. The *only* change clearly expressed was to apply the jury right to "all" contempt proceedings growing out of labor disputes.

The judgment of the Court below should be reversed.

Respectfully submitted,

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